Nos. 04-1528 & 04-1530

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IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM SORRELL, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF CURRENT AND FORMER STATE COURT JUSTICES AND JUDGES IN SUPPORT OF RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND RESPONDENTS-INTERVENORS-CONDITIONAL CROSS PETITIONERS

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With the consent of the parties, *Amici Curiae* hereby submit their brief in support of the Respondents-Conditional Cross Petitioners in these cases and Respondents-Intervenors-Conditional Cross Petitioners.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici Curiae are current and former state court justices and judges, who are deeply concerned about the growing influence of special interest money on judicial campaigns.[2] Most of the *Amici* have personal experience as candidates in judicial elections, and all of them deplore the disturbing trends described in this brief. *Amici* do not necessarily support spending limits in any particular campaigns for the bench, but they believe that states should have the option to

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[1] Letters of consent from counsel for all parties have been filed with the Clerk of this Court. No party's counsel authored any part of this brief. No person or entity other than *Amici* and their counsel contributed monetarily to preparing or submitting the brief.

[2] *Amici curiae* are former Chief Justices of state high courts: Hon. James G. Exum, Jr. (North Carolina Supreme Court, 1986-1994), Hon. Richard P. Guy (Washington Supreme Court, 1999-2001), Hon. William C. Hastings (Nebraska Supreme Court, 1987-1995), Hon. Conrad L. Mallett, Jr. (Michigan Supreme Court, 1997-1998), Hon. Vincent L. McKusick (Maine Supreme Judicial Court 1977-1992), Hon. Robert A. Miller (South Dakota Supreme Court, 1990-2001), Hon. Robert Utter (Washington Supreme Court, 1979-1981); former and current Associate Justices and Associate Judges of state high courts: Hon. Andy Douglas (Ohio Supreme Court, 1985-2002), Hon. Robert H. Dudley (Arkansas Supreme Court, 1981-1996), Hon. Stewart F. Hancock, Jr. (New York Court of Appeals, 1986-1993), Hon. Howard A. Levine (New York Court of Appeals, 1993-2002), Hon. David Newbern (Arkansas Supreme Court, 1985-1998), Hon. Alice Resnick (Ohio Supreme Court, 1989-present), Hon. Cruz Reynoso (California Supreme Court, 1982-1987); and former and current Justices and Judges of intermediate appellate and trial courts: Hon. Murry Cohen (Court of Appeals for the First District of Texas, 1983-2002), Hon. Donald J. Horowitz (Superior Court of Washington for King County, 1973-1977), Hon. James Wynn (North Carolina Court of Appeals, 1990-present).

consider such limits as a narrowly tailored response to imminent threats to the real and perceived impartiality and independence of the judiciary. *Amici* recognize that the instant case does not pertain directly to campaigns for the bench. But the petitioners in the instant case maintain that *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), is an absolute bar to mandatory spending limits, even in judicial elections. *Amici* therefore urge this Court to grant both their petitions (as to Question 1 in each) and the conditional cross petitions to resolve whether that interpretation is correct and, if it is, to reconsider *Buckley*.

Most of the *Amici* on this brief previously asked this Court to review the same issue in *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir.), *cert. denied*, 125 S. Ct. 625 (2004). They are now joined by additional former and current state judges and justices, who wish to renew that request with new campaign fundraising and interest group spending data from the 2004 state Supreme Court elections. The escalation in 2004 of the troubling trends described in their *amicus* brief last year brings new urgency to this request for consideration of the petitions (as to Question 1) and the conditional cross petitions in these cases.

SUMMARY OF ARGUMENT

The constitutionality of spending limits in judicial elections has never been considered by this Court. When *Buckley* was decided, campaigns for the bench were inexpensive, uncontentious, and largely unnoticed. There was no call for expenditure ceilings under the circumstances of those campaigns, and there was no reason for the *Buckley* Court to decide whether such caps could survive constitutional scrutiny.

But judicial elections have changed dramatically since the 1970s. Several states have seen million-dollar campaigns

for their Supreme Courts, and an arms-race mentality is growing, as candidates build ever-larger war chests in the search for electoral success. Without spending limits to reduce the demand for private contributions, candidates increasingly must solicit funds from wealthy special interests on either side of the issues likely to come before the court. The highly visible infusions of unlimited special interest money into the coffers of judicial candidates leaves the public wondering whether justice is for sale.

To date, courts reviewing the constitutionality of spending limits in judicial elections have not been willing to consider the changed circumstances of modern campaigns for the bench, which were not and could not be considered in *Buckley*. Their refusal is grounded on the same premise endorsed by petitioners in these cases—that *Buckley* represents an absolute bar to spending limits no matter what the circumstances. With traditional standards for judicial elections rapidly eroding—and, with them, public confidence in the courts—the petitions (as to Question 1) and the conditional cross petitions should be granted in these cases to clarify whether that interpretation is correct and, if so, to reconsider *Buckley*. See Point I.

The petitions (as to Question 1) and the conditional cross petitions should also be granted to resolve whether interests not considered in *Buckley* might justify spending limits in judicial elections. At least three distinct interests—in the impartiality of the judiciary, in its independence, and in the appearance of impartiality and independence—are potentially compelling enough to support such limits. At this critical juncture, when all three interests are in serious jeopardy, this Court should take the opportunity to consider whether *Buckley* permits consideration of new rationales for spending limits, and if it does not, to reconsider *Buckley*. See Point II.

ARGUMENT

I. The Changes in Judicial Campaigns Since the Decision in *Buckley* Are Grounds for Reconsideration of the Circumstances Under Which Spending Limits Might Be Constitutional.

In recent years, studies have documented the increasing demand for large sums of money to support candidacies for the bench in states with elective judiciaries. Because the contributions come principally from parties and attorneys who appear in court, the public concludes that the contributors are meant to influence, and do influence, decision-making on the bench. Because these developments post-dated the decision in *Buckley*, and because Congress did not presume to regulate state judicial elections in the Federal Election Campaign Act, the *Buckley* Court did not consider the constitutionality of spending limits in campaigns for the bench. This Court should grant the petitions (as to Question 1) and the conditional cross petitions for writs of certiorari in these cases to clarify whether *Buckley* bars such limits in all elections and, if it does, to reconsider *Buckley*.

A. Judicial Campaigns Have Materially Changed for the Worse Since *Buckley*.

It is no secret that "campaigning for a judicial post today can require substantial funds." *Republican Party of Minnesota v. White*, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring). Fundraising by state Supreme Court candidates jumped from $28,291,950 in 1998 to $45,636,059 in 2000, an increase of 61 percent in just one election cycle. Deborah Goldberg *et al.*, *The New Politics of Judicial Elections* 7 (Justice at Stake 2002), *at* http://www.justiceatstake.org/files/JASMoneyReport.pdf [hereinafter *New Politics 2000*]. "That increase was no 'sport,' but a new peak in a clear, dramatic

trend whether viewed in terms of total dollars, or dollars-per-seat, or percentages." Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. Rev. Mich. St. U.-Detroit C.L. 849, 862. In 2002, the four general election candidates for two Ohio Supreme Court seats raised a total of $6,241,583, and none raised less than $1,193,732. Deborah Goldberg & Samantha Sanchez, *The New Politics of Judicial Elections 2002* 15 (Justice at Stake 2004), *at* http://faircourts.org/files/NewPoliticsReport2002.pdf [hereinafter *New Politics 2002*].

The 2004 state Supreme Court elections continued this trend. For the third straight election cycle, more than 10 candidates raised as much as $1 million in pursuit of a seat on the bench. Deborah Goldberg *et al.*, *The New Politics of Judicial Elections 2004*, 14-15 & Fig. 10 (forthcoming Justice at Stake 2005), *available as of July 2005 at* http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf [hereinafter *New Politics 2004*]. In just one cycle, the cost of winning jumped 40 percent. *Id.* at 13-14. And nine out of 22 states with contested races broke aggregate fundraising records. *Id.* at 13.

The high and unquestionably growing demand for funds is in part the result of changes in the way campaigns are run. In 2000, Supreme Court candidates ran television ad campaigns in only four states. *New Politics 2000*, at 13. Two years later, the number of states seeing television commercials financed by Supreme Court candidates rose by 75 percent. *New Politics 2002*, at 8. This past year, candidates for their state's highest court bought television airtime in 16 states, quadrupling the number of states in just four years. *New Politics 2004*, at 3. The high cost of airtime forces judicial candidates to raise large sums from parties interested in influencing judicial decision-making. *See* Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30

Cap. U. L. Rev. 455, 474 (2002) [hereinafter *Independence and Democratic Accountability*] ("The expensiveness of media campaigns has the dramatic effect of forcing not only judicial candidates but sitting judges hoping for re-election to seek and accumulate large campaign war chests.").

Studies show that most of the money financing Supreme Court campaigns is raised from persons and entities who regularly appear in court. *See id.* ("Often, lawyers or litigants who are likely to appear before the judge constitute large proportions of the contributions to judicial candidates."). From 1989 through 2000, nearly half of all contributions to Supreme Court candidates came from attorneys and business. *New Politics 2000* at 9. In 2002, two thirds came from those sources. *New Politics 2002* at 18. Approximately 60 percent of funds raised by candidates in 2004 came from business and lawyers, with millions of additional dollars funneled through political parties and interest group associations. *New Politics 2004*, at 20, 26, 27 & Figs. 14, 17, 18.

> The result can be an unhealthy dependence between judicial candidates and interest groups where interest groups back judicial candidates to secure their political agendas and candidates rely on interest group backing to achieve an to retain judicial office.

Anthony Champagne, *Interest Groups and Judicial Elections*, 34 Loy. L.A. L. Rev. 1391, 1393 (2001) [hereinafter *Interest Groups*]. That visible dependence prompts complaints that candidates "sully the court's reputation by raising millions of dollars from parties and lawyers who have business before the court." Texans for Public Justice, *Payola Justice* (1998), *at* http://www.tpj.org/docs/1998/02/reports/payola/conclusions.html. Without spending limits, candidates of high integrity are sullied by a campaign finance system that leaves them no

choice but to raise as much as they can to ward off defeat or to win a seat.

B. The Unlimited Money Chase in Contemporary Judicial Elections Undermines Public Confidence in the Courts

The rapid spread of highly visible, expensive campaigns for the bench, financed by groups and individuals with stakes in the outcome of judicial decision-making, is taking a toll on the courts. Survey research has shown that 76 percent of registered voters believe that campaign contributions influence judges' decisions. Greenberg Quinlan Rosner Research & American Viewpoint, National Public Opinion Survey, Frequency Questionnaire at 4 (2001), *at* http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf. Two-thirds of all voters believe that litigants who have made campaign contributions to judges often receive favorable treatment. *See id.* at 7. A similar poll in 1999 found that 81 percent of the public thought that political considerations influence judge's decisions, and 78 percent believed that elected judges are influenced by having to raise campaign funds. *See* National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey*, *at* http://www.ncsc.dni.us/ptc/ptc.htm.

Such statistics do not surprise the former Chief Justice of the (elected) Texas Supreme Court. He asks: "How can judges convince the public that their only constituency is the law when their tenure in office depends on campaign contributions from lawyers and litigants?" Hon. Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 Ohio St. L.J. 137, 144 (2003) [hereinafter *Electoral Accountability*]. Referring to the "obscene" amount of money spent on an Illinois Supreme Court race this year, the winning candidate asked, "What does it gain the people? How can people have faith in the system?" Ryan Keith,

Spending for Supreme Court Seat Renews Cry for Finance Reform, Associated Press, November 3, 2004.

The general public perception is shared, to a lesser but still alarming extent, by individuals with extensive experience in our justice system. Fully 26 percent of state court *judges* agreed that campaign contributions have more than a little influence on decisions. Greenberg Quinlan Rosner Research & American Viewpoint, National Public Opinion Survey, Frequency Questionnaire at 5 (2002), *at* http://faircourts.org/files/JASJudgesSurveyResults.pdf. A 1999 survey of Texas state judges conducted by that state's Supreme Court and its bar association found that nearly half believed contributions had a significant effect on courtroom decisions. Texas Office of Court Administration & State Bar of Texas, *The Courts and the Legal Profession in Texas—The Insider's Perspective: A Survey of Judges, Court Personnel, and Attorneys*, Executive Summary 5 (1999). Anecdotal evidence suggests that lawyers, too, believe that their contributions to judges affect their chances of success in court. David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 Cath. U. L. Rev. 361, 379 (2001) [hereinafter *On the Make*].

Even if trust in government is declining generally, erosion of confidence in the courts is of particular concern. "That is because the authority of 'the least dangerous branch' rests almost entirely on the voluntary compliance with its rulings by the other branches of government and by the public at large." *Electoral Accountability*, at 144. Without public confidence in the fairness and impartiality of our courts, the rule of law is at risk.

C. This Court Should Grant Writs of Certiorari to Clarify the Application of *Buckley* to Circumstances Not Considered in That Case.

Judicial campaigns were not always contentious and expensive. "The old style of judicial campaign was a low budget affair where the judicial candidate spoke to any group willing to hear a dull speech about improving the judiciary or about judicial qualifications." *Interest Groups*, at 1393. The large campaign contributions and scandals of the Watergate years that motivated Congress to enact spending limits in the 1974 amendments to the Federal Election Campaign Act were confined at that time to elections for legislative and executive office. "Judicial campaigns first experienced [soaring spending] in only a few states, starting in the early 1980s." Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 Loy. L.A. L. Rev. 1489, 1489 (2001). *Buckley* thus did not and could not consider the special threats presented by uncontrolled fundraising in judicial elections when examining the state interests that might justify spending limits.

Notwithstanding this history, courts adjudicating the constitutionality of spending limits in judicial campaigns have interpreted *Buckley* to preclude such caps. *See Suster v. Marshall*, 149 F.3d 523, 529 (6th Cir. 1999), *aff'g*, 951 F. Supp. 693 (N.D. Ohio 1996). According to *Suster*, when considering the constitutionality of expenditure ceilings, "the prevention of corruption is the only interest the Supreme Court has and, hence, this Court will give credence," *id.* at 532, and every other justification must be summarily dismissed "irrespective of the *kind* of position sought," *id.* at 530. But the *White* Court has since declared, "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." 536 U.S. at 783. This Court should therefore grant the petitions (as to Question 1) and the

conditional cross petitions for writs of certiorari in these cases to clarify that *Buckley* does not preclude consideration of the new and unique threats presented by uncontrolled fundraising from special interests in campaigns for the bench or the unique rationales for spending limits in those campaigns. If *Buckley* does represent that absolute bar, the writs should be granted to reconsider *Buckley*.

II. Limits on Spending in Judicial Campaigns Are Supported by Especially Compelling Interests Not Considered in *Buckley*.

Buckley considered and rejected three interests proffered in defense of spending limits in federal campaigns for executive and legislative office. 424 U.S. at 39-59. But "*Buckley*'s rejection of expenditure restrictions for presidential and congressional elections is distinguishable because of the unique nature of the judicial role and the importance of judicial independence." Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 Chi.-Kent l. Rev. 133, 135 (1998) [hereinafter *Preserving an Independent Judiciary*]. In addition to the interest in judicial independence, the interests in judicial impartiality and the appearance of independence and impartiality, *see* J.J. Gass, *After* White: *Defending and Amending the Canons of Judicial Ethics* (Brennan Center for Justice 2004), *at* http://www.brennancenter.org/resources/ji/ji4.pdf (defining the three separate interests) [hereinafter *After* White], also provide grounds for distinguishing *Buckley*. Deborah Goldberg, *Public Funding of Judicial Elections: The Role of Judges and the Rules of Campaign Finance*, 64 Ohio St. L. J. 95, 116-17 (2003) ("[T]he state interests uniquely implicated in [campaigns for the bench] provide a compelling justification for limiting spending by judicial candidates."). Because courts reviewing the constitutionality of spending limits in judicial elections have rejected consideration of any

justifications not explicitly endorsed by the *Buckley* Court, writs of certiorari should be granted in these cases to eliminate any confusion about the nature of the interests that might justify caps on spending in specialized contexts.

A. Courts Should Be Permitted to Consider Whether the Interest in Judicial Impartiality Supports Spending Limits in Campaigns for the Bench.

The mandate for judicial impartiality is implicit in the Due Process Clause of the U.S. Constitution. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). As one court has recently affirmed, "litigants have a right guaranteed under the Due Process Clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has the obligation to create such a forum . . . ." *Raab v. State Comm'n on Judicial Conduct*, 793 N.E.2d 1287, 1290-91 (N.Y. 2003). Although the term "impartiality" may be understood in a variety of ways, *see White*, 536 U.S. at 775-78; Ofer Raban, *Judicial Impartiality and the Regulation of Judicial Election Campaigns*, 15 U. Fla. J.L. & Pub. Pol'y 205, 21-19 (2004) (criticizing *White*'s analysis of impartiality), under one common post-*White* construction, impartiality is a compelling interest that may well support spending limits in judicial campaigns.

Since *White*, courts have recognized that impartiality precludes judges "from binding themselves, or appearing to bind themselves, to take action against particular *kinds* of parties." *After* White at 7 (emphasis added). On this understanding, admitted favoritism toward law enforcement in criminal cases is inconsistent with impartiality. *See Watson v. State Comm'n on Judicial Conduct*, 794 N.E.2d 1, 4-5 (N.Y. 2003); *In re Kinsey*, 852 So. 2d 77, 88-89 (Fla.), *cert. denied*, 124 S. Ct. 180 (2003). Impartiality would also

foreclose a preference for plaintiffs or defendants in tort cases.

But the dynamics of modern judicial elections press candidates for the bench toward precisely this form of bias. The unlimited demand for funds inherent in any campaign finance system without expenditure ceilings forces candidates to accept large sums from well-defined special interests, whether plaintiff-side personal injury lawyers or defense-side corporate lawyers. *Compare Independence and Democratic Accountability* at 474 (describing trial lawyer contributions) *with Preserving an Independent Judiciary* at 137 (describing contributions from corporate defense lawyers). We cannot assume that judges will ignore the prospect of losing that support in the next election if they fail to meet contributors' expectations. To reduce the demand for campaign funds and thereby combat that threat to impartiality, courts should be permitted to consider whether limits on judicial campaign spending are constitutional.

B. Courts Should Be Permitted to Consider Whether the Interest in Judicial Independence Supports Spending Limits in Campaigns for the Bench.

Like "impartiality," judicial "independence" is also susceptible to various interpretations, and the two terms are sometimes used interchangeably. *See White*, 536 U.S. at 775 n.6. But when "independence" is not used merely as a synonym for "impartiality," it speaks to a second value of constitutional significance—the principle of separation of powers. *See Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 130 S.W.3d 524, 532 (Ark. 2003) ("Judicial independence is a hallmark of our system of government, and we cannot abide . . . entanglements between the judicial and other branches of government . . . .").

> An independent judiciary is: (1) not dominated by or dependent on the other two branches of government; (2) not unduly entangled in the political machinery of the other branches . . . ; and (3) not actuated in its decision-making process by the same considerations and interests as the other branches.

After White at 8. At the very least, the third aspect of judicial independence is implicated in the financing of campaigns for the bench.

Judicial campaign finance systems that require candidates to collect unlimited numbers of private contributions give enormous power to wealthy interest groups. The control by those groups over the large sums needed for campaigns carries with it the ability to influence the pool of judicial candidates. Candidates whose commitment to considering each case on its merits is demonstrably paramount will be less likely to attract support than candidates who give priority to political considerations. Increasingly, the distinction between the judiciary and the other branches of government—a distinction that enables courts to serve as a check on executive and legislative power—will be blurred. For this reason, too, courts should be permitted to consider whether limits on judicial campaign spending are constitutional.

C. Courts Should Be Permitted to Consider Whether the Interest in the Appearance of Impartiality and Independence Supports Spending Limits in Campaigns for the Bench.

The interest in the appearance of impartiality and independence is a third and distinct interest that may support spending limits in judicial elections. As this Court has recognized: "The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do

their very best to weigh the scales of justice equally between the contending parties." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (internal quotation omitted). Appearances count because "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

That reputation has been besmirched by the influence of money in judicial elections. The unlimited fundraising from special interests on both sides of various policy debates has drawn accusations of "capture" and "legalized bribery." *On the Make* at 361, 427. There is a compelling interest in stemming this loss of trust, because "without public confidence the judicial branch could not function." Hon. William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 Am. U.L. Rev. 263, 274 (1996). Combating threats to the appearance of impartiality and independence represents a third compelling interest potentially justifying limits on spending in judicial elections. This Court should grant the petitions (as to Question 1) and the conditional cross petitions for writs of certiorari in these cases to clarify that *Buckley* does not preclude consideration of that interest or, if such consideration is barred, to revisit *Buckley*.

CONCLUSION

The changed circumstances of judicial elections over recent years and the distinct interests supporting spending limits in campaigns for the bench argue for allowing states to make the case for caps on judicial spending. As long as the ceilings are high enough to ensure that all candidates can convey their message to voters, due process concerns for the impartiality and independence of the courts—in reality and appearance—should overcome burdens on the candidates' First Amendment rights. But as *Buckley* has been interpreted

by the Sixth Circuit in *Suster* and the Tenth Circuit in *Homans*, the door is closed to such arguments. The instant petitions (in Question 1) and conditional cross petitions present a rare opportunity to revisit that reading of *Buckley* and to resolve a split among the circuits created by the Second Circuit in these cases. *Amici* understand that these cases do not directly concern judicial elections. But *Amici* respectfully request that the Court grant the petitions (as to Question 1) and the conditional cross petitions for writs of certiorari in these cases to clarify whether *Buckley* presents an absolute bar to consideration of new facts and new state interests when reviewing the constitutionality of spending limits and, if such consideration is foreclosed, to revisit *Buckley*.

Respectfully submitted,

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